



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/088,954	08/12/2002	David Rudov	1805	4890

24264 7590 06/28/2005

TIMOTHY J MARTIN, PC  
9250 W 5TH AVENUE  
SUITE 200  
LAKEWOOD, CO 80226

EXAMINER

MELLER, MICHAEL V

ART UNIT PAPER NUMBER

1655

DATE MAILED: 06/28/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/088,954

Applicant(s)

RUDOV, DAVID

Examiner

Michael V. Meller

Art Unit

1654

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 4/4/2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 28-64 is/are pending in the application.
- 4a) Of the above claim(s) 28-37 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 38-64 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

**DETAILED ACTION**

***Election/Restrictions***

Claims 28-37 continue to be withdrawn from further consideration by the examiner as being drawn to non-elected subject matter.

The restriction requirement is still proper and still is FINAL.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 38-65 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claims are written in such confusing terms. What is meant by "a primary substance operative" ? This is confusing. Applicants are adding an antibiotic to the rye grass, so it should be claimed as such. What is a primary substance operative, water ? The claims are claiming a product and should be claimed as such. One or two claims to the product would make more sense with dependent claims therefrom.

The claims also are confusing since they do not definitely define what is in the composition. The composition should comprise components or compounds which are clearly defined.

Applicant has now amended the claims into even more confusing language. The claims now read that the primary substance is an operative. What is an operative ? The operative appears to be a compound and should be claimed as such. Applicant is claiming a product not a method of using the product.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 38-65 are rejected under 35 U.S.C. 102(b) as being anticipated by Rudov (US 4943433-abstract, col. 1, lines 50-60), WO 91/11191 (abstract, page 3, lines 13-35, page 6, lines 31-page 7, line 7) or AU- A- 81985/87 (page 2, lines 10-23, page 4, lines 9-22, claims).

The references each teach that rye grass and antibiotics/anti-microbial /anti-bacterial are used together. Applicants argue that the use of the compositions is not the same as in the invention, but the use is not important, the product is the product. The product is all that is being examined.

Applicants also argue that the references do not teach the addition of a primary substance for the treatment of the ailments because the extract is effectively the primary substance of the composition disclosed.

This argument is simply not understood. The references teach the "primary substance" (antibiotics/anti-microbial /anti-bacteria agents). They also teach the rye grass. They also teach use of the composition in cream form (topical), injectable forms (intravenous), tablets (oral). The art clearly shows administering the rye, corn, rice, oat, sorghum and millet grasses. The art also very clearly shows administering with those grasses antibiotics/anti-microbial /anti-bacteria agents. Thus, applicants arguments are without merit and not understood since it is so clear in the art that both the grass extracts such as rye and antibiotics/anti-microbial /anti-bacteria are known to be together with a carrier.

Applicants have argued that the term "operative" differentiates the invention over the references. The term operative is not understood. The operative is most likely a compound. The product is a compound. It does not matter what it is used for since the claims are drawn to a product and **not** the method of using the product. The fact that applicant has inserted "operative" into the claim does not give the claim any more

Art Unit: 1654

patentable distinction over the art it has just simply made the claim even more confusing, vague and indefinite.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 38-65 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rudov (US 4943433), WO 91/11191 or AU A 81985/87.

The references teach what is above. It would have been obvious to use specific amounts of the extract and in the different forms since they are simply the choice of the artisan in an effort to optimize the desired results. Using different carriers such as vanishing cream, benzyl alcohol are obvious to use since the references clearly teach use as cosmetics and cosmetics use both of these substances on a routine basis.

The same arguments are being offered by the applicant as above and thus the same rebuttal is offered here too.

Applicants have argued that the term "operative" differentiates the invention over the references. The term operative is not understood. The operative is most likely a compound. The product is a compound. It does not matter what it is used for since the claims are drawn to a product and **not** the method of using the product. The fact that applicant has inserted "operative" into the claim does not give the claim any more patentable distinction over the art it has just simply made the claim even more confusing, vague and indefinite.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael V. Meller whose telephone number is 571-272-0967. The examiner can normally be reached on Monday thru Thursday: 9:30am-6:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Bruce Campell can be reached on 571-272-0974. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Michael V. Meller  
Primary Examiner  
Art Unit 1654

MVM